STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 16,142
	)	
Appeal of	)	

INTRODUCTION

The petitioner appeals a decision of the Department of Social Welfare finding that she is disqualified from the receipt of long-term care Medicaid benefits for 97 months due to the transfer of available resources.

FINDINGS OF FACT

The parties have agreed that the following facts are operative in this matter:

1. A.K. [petitioner] was divorced from D.B. by an order of the Lamoille Superior Court dated August 29, 1979, with the decree nisi becoming absolute on September 29, 1979. Attached as Exhibit No. One.

2. The trust referred to in the Decree was signed on May 25, 1979. Attached as Exhibit No. Two.

3. On February 11, 1997, [petitioner] named her daughter, S.B., as her Power of Attorney. Attached as Exhibit No. Three.

4. On October 15, 1998, [petitioner] was hospitalized.

5. On October 29, 1998, [petitioner] was admitted to Rowan Court Health and Rehabilitation Center in Barre, Vermont.

6. [Petitioner's] Medicare Part A benefits ended on December 31, 1998.

7. On March 30, 1999, D.B. filed a Motion to Modify the Trust and the Divorce Decree. Attached as Exhibit No. Four.

8. On April 7, 1999, a Stipulation to Modify the Trust and the Divorce Decree were signed by D.B., ex-husband and defendant, and by [petitioner], ex-wife and plaintiff. Attached as Exhibit No. Five.

9. On April 19, 1999, the Order to Modify the Trust and the Divorce Decree was signed by the Family Court Judge. Attached as Exhibit No. Six.

10. On June 11, 1999, [petitioner] applied for Long-Term Care Medicaid benefits.

11. On September 15, 1999, the Department sent [petitioner] a Notice of Decision indicating that her application was being denied. The notice indicated that Long-Term Care Medicaid was being denied because [petitioner] had transferred resources resulting in a 97-month penalty period.

Attached as Exhibit No. Seven.[1]

12. The Department denied [petitioner's] Long Term Care application because it determined that [petitioner] had transferred resources and assessed a ninety-seven (97) month penalty period. Specifically, the Department concluded that the loss of income from alimony and the Trust should be considered as a transfer of income by [petitioner].

13. The Department calculated the ninety-seven (97) month penalty period as follows:

> Annual Interest Income from the Trust Account as indicated on [Petitioner's] 1998 Tax Return $5,779.00.
>
> Annual Alimony as indicated on [petitioner's] 1998 Tax Return $18,466.00.
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> ---
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> Annual TOTAL income from alimony and the Trust $24,245.00 Multiplied by [petitioner's] Life Expectancy of 16.76 years equals $406,346.20

$406,346.20 divided by $4,160 equals a 97 month penalty period.

14. D.B. is not [petitioner's] spouse or agent.

ORDER

The decision of the Department is affirmed.

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[1] The original decision also denied community-based Medicaid. However, the Department subsequently reversed that decision. All facts in the stipulation relating to that reversed decision have been removed as they are not relevant to the remaining issue.

REASONS

The Medicaid program was established in 1965 as a result of amendments that added Title XIX to the Social Security Act. It is a program administered within a federal-state regulatory framework. The first statutory section of Title XIX, 42 U.S.C. § 1396, "Appropriation" states:

> For the purpose of enabling each State, as far as practicable, under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and beneficiaries attain or retain the capability for independence and self-care, there is hereby authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this subchapter. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for medical assistance.
>
> (Emphasis supplied.)

Vermont has chosen to participate in this program and the legislature authorized the Commissioner of Social Welfare to prescribe income standards to determine when a "person is medically indigent" for purposes of receiving federal matching funds. 33 V.S.A. § 1902. The regulation adopted by the Commissioner requires that "all resources must be counted except those specifically excluded." M230. Under this regulation, all payments due to the applicant or due to third

parties for her care are counted. Trusts are excluded only if they are established by someone other than the applicant or her spouse so long as the applicant cannot revoke or have access to the trust without trustee intervention. M234 (10).

There are additional rules for counting resources for persons who are seeking Medicaid payment for long-term care. See M410 et seq. Of particular concern here is the regulation which forbids applicants in long-term care facilities from transferring assets available for their medical care in order to obtain Medicaid eligibility. The regulation provides in pertinent part:

. . .

> An individual who resides in long-term care and/or his/her spouse may transfer an excluded asset, other than the home, contiguous land and other buildings on the land, without penalty if that asset was excludable at the time of transfer. An individual who resides in long-term care and/or his/her spouse may also transfer certain countable assets (including the home, contiguous land, and other buildings on the land) without penalty under the conditions listed in the No Penalty for Transfer section.
>
> An individual who is admitted to long-term care will have all transfers of non-excluded assets for less than fair market value within a period immediately prior to the admission (or immediately prior to date of application for Medicaid, if later) to long-term care evaluated in terms of whether or not a penalty period of restricted Medicaid coverage is to be imposed. In addition, all such transfers of resources after 12/19/89 by the spouse of an individual who applies for Medicaid coverage of long-term care shall be subject to the same

evaluation to determine whether or not a penalty period of restricted Medicaid coverage is to be imposed on the spouse in long-term care. . . . Assets (income and resources) transferred by a long-term care resident or transferred by his/her spouse on or after 1/1/94 are considered for 36 months from the date of transfer or, in the case of payments from a trust or portions of a trust that are treated as a transfer, for 60 months from the date of the payment(s) or the transfer (see Trusts).

An individual and/or his/her spouse who takes action to decrease the extent of ownership interest he/she has in a countable asset shall have this action treated under this transfer policy only to the extent that it results in an actual reduction of countable assets. The transfer is considered to have taken plan on the date the other person(s) take an action which reduces or eliminates the individual's (or spouse's) ownership or control of the countable asset and the amount of the transfer is equal to the amount by which the asset available to the individual and/or his/her spouse is reduced in value. . . .

M. 416

The regulation also provides as follows:

Note: the term assets includes all income and resources of the individual and of the individual's spouse, including any income or resources which the individual or his/her spouse is entitled to but does not receive because of action by:

- the individual or his/her spouse; or
- a person, including a court or administrative body, with legal authority to act in place of or on behalf of the individual or his/her spouse; or
- by any person, including any court or administrative body, acting at the direction or upon the request of the individual or his/her spouse.

M416

The assets at issue here include a trust that was established in May of 1979, and alimony and medical payments ordered by the Superior Court in August of 1979. The trust was established by the petitioner's then husband out of property owned by him and property owned jointly with the petitioner in order to settle property and alimony issues arising out of a pending divorce. A bank was appointed trustee to receive and manage the trust corpus which was then valued at $136,700 and to make payments to the petitioner "for her care, support, maintenance and benefit in sickness and in health" in monthly installments from the net annual interest income of the trust." (Exhibit No. 2, Articles II (A) and (B)). In the event the petitioner became disabled, the trustee was instructed to make payments from both the income and principal to anyone providing services (medicine, medical, psychiatric, surgical and dental) to the petitioner if they were not paid by her spouse pursuant to the court order or by insurance benefits he may have obtained. (Exhibit No. 2, Article II (B)). In the event the soon to be ex-husband did not fund the trust or make court ordered alimony payments, the principal could also be invaded for her general care and

support. (Id., Article II(C)). Any payments made out of the principal for the petitioner's medicine, medical, surgical and dental care were not to be limited by the terms of the divorce order. (Id., Article II (C)). These payments were to continue so long as the petitioner should live (Id., Article II (E)). Upon the petitioner's death, the remaining trust assets were to be paid to the couple's children. (Id., Article III, (A), (B) and (C)). The trust was revocable by the petitioner's husband during the petitioner's lifetime but only upon approval by the divorce court.

The divorce decree signed August 29, 1979, ordered the funding of the above trust. (Exhibit No. 1, Pars. 4, 7, 8, and 9.) It also ordered the petitioner's ex-husband to pay her alimony each year according to a formula which required him to pay the difference between what the trust paid and $12,500 per year. The $12,500 figure was subject to a yearly cost of living increase so long as the ex-husband was not retired or disabled. (Id., Pars. 10 and 11.) If the petitioner re-married, she would only get the income from the net trust. (Id., Par. 12.) The petitioner's ex-husband was also required to pay "the reasonable costs of medicine for [petitioner] and of medical, surgical and dental care and attention for [petitioner] and may provide the same, by

insurance, the premiums of which shall be paid by him." (Id., Par. 14.) That same paragraph makes it clear that the ex-husband was to pay any amounts not covered by insurance and that his obligation would cease only with her remarriage. The petitioner does not argue that these assets were not available to her or that they would have been excluded assets if she still retained them.[2] It appears that the petitioner was paid under these trust and decree provisions for many years. For reasons not outlined in the stipulation, the petitioner appointed her daughter power of attorney on February 11, 1997. The petitioner's ex-husband succeeded the bank as trustee on February 5, 1998. The value of the payments to the petitioner in 1998 was $24,245, $5,779 from trust interest and $18,466 from alimony payments. The petitioner was hospitalized on October 15, 1998 for a couple of weeks and then was discharged to a nursing home on October 29, 1998 where she remains. Her Medicare Part A (hospitalization) benefit ran out on December 31, 1998. It appears at that point that the petitioner's ex-husband and the trust would have become liable for her nursing home payments.

[2] The income from the trust itself would not have been excluded at that time because the trust was set up by her spouse and gave the trustee no discretion about paying over the net trust income to the petitioner. M234 (10).

On March 30, 1999, the petitioner's ex-husband petitioned the family court to modify the final decree to release him from his obligation to pay medical care under paragraph 14 and alimony under paragraphs 9 and 10. He also petitioned the Court to reform the original trust to pay for only those services rendered to the petitioner which would not be covered by Vermont Medicaid. The basis for this request was her ex-husband's assertion that the petitioner's need for nursing home care was not anticipated by the parties and that the assets would be wasted and not preserved for the couple's children, as they had intended, if they were spent for her medical care when Vermont Medicaid could cover these same expenses. The petitioner signed a stipulation agreeing to the modification a week after it was filed and it was signed as an order by the Court twelve days later on the basis of the stipulation.

The Department has determined that the petitioner transferred non-excluded assets that were available to her for less than fair market value less than two months before she applied for Medicaid long term care benefits for the purpose of becoming eligible for Medicaid and should thus be disqualified from receiving Medicaid benefits for 97 months. The 97 month figure was obtained by multiplying her yearly

income (from her 1998 tax returns) by her life expectancy and dividing the result by the monthly cost of private nursing home care in Vermont, $4,160 per month. M416.23. The petitioner does not dispute that her assets were as valued, that they were transferred for less than fair market value, that the transfer took place just a few weeks before her Medicaid application and that the purpose of the transfer was to make her eligible for Medicaid and to preserve the trust assets for her children. She does dispute, however, that she is the person who transferred the assets.

The Medicaid regulation cited above attributes a transfer to an individual in several different circumstances including that in which the individual is entitled to income or resources but does not receive them "because of action by. . .any person, including any court or administrative body acting at the direction or upon the request of the individual or his/her spouse." M416 at "note." The petitioner's first argument is that the court acted not on her request, but on that of her ex-husband to transfer the assets. In support of this contention, she points out that it was her ex-husband who filed the motion to eliminate her alimony and health care payments and to reform the trust. She argues that she cannot

be held responsible for the actions of a person to whom she is no longer married.

While it may be true that the petitioner's ex-husband filed the initial motion to modify the court decree, the petitioner herself joined in that motion within a few days. The stipulation signed and filed by the petitioner and her ex-husband begins with the sentence: "The parties to this action, through undersigned counsel, move this Court for modification of the final order in this matter, filed in Lamoille Superior Court on September 19, 1979." (Emphasis supplied.) The stipulation goes on to recite that the petitioner agreed that unanticipated circumstances exist to justify modification; that she agreed to eliminate all parts of the decree ordering alimony and health care payments to her; and, agreed to reform the trust to pay her only for items not covered by Medicaid. Based upon this language, it must be found that the petitioner also requested the court to take the action it did.

The petitioner next argues that it doesn't matter who made the request because a heavy burden was on her ex-husband to show a change of circumstances under the statue allowing modification of decrees (15 V.S.A. § 758) and that he was found to have met that burden. Wardwell v. Clapp, 168 VT. 592

(1998). While it is true that the court found that the burden had been met, that finding was based upon the stipulation of the parties, not upon any other evidence taken by the Court. By joining in the request and stipulation, the petitioner allowed her ex-husband to meet his burden without putting on any additional evidence. In the same vein, the petitioner argues, citing Hopkins v. Hopkins, 130 VT 475 (1972), that the court was not bound by the stipulation of the parties. While the court does have the discretion to make a decision based on other evidence not contained in the stipulation, the court must give great weight on any agreement of the parties with regard to the disposition of property. Lewis v. Lewis, 149 VT. 19 (1987). It is clear that the court accorded great weight to this agreement and apparently took no other evidence. The court signed a modification order which was prepared by her ex-husband's attorney and exactly followed the facts and relief requested in the stipulation. The order clearly recited that it was based upon the motion and "the stipulation of the parties", not upon any other evidentiary information. It is obvious that the court was entirely directed by the petitioner's agreement to the motion and factual allegations in its fact finding and order.

The petitioner argues, in addition, that it was futile for her to oppose her ex-husband's motion because the law was in his favor, and because the legal cost of such futile opposition is not required of her under the regulations. Both of these assertions are found to be totally without merit. As was pointed out earlier, a heavy burden was on her ex-husband to show an unanticipated, significant change in circumstances. He made this claim based upon his surprise at finding his elderly ex-spouse in a nursing home, an expense, which he claims he could not have anticipated. However, in the divorce decree and the trust instrument he makes a clear commitment to caring for the petitioner (so long as she did not remarry) and her medical needs until the end of her life. The trust also makes provision for invading the principal in the case of the petitioner's "disability" to provide for her care and allows the ex-husband to purchase insurance to cover all her health contingencies. In addition, her ex-husband did not allege that there had been any change for the worse in his financial circumstances which would make it difficult for him to carry out his obligation. The petitioner certainly had good defenses to raise to her ex-husband's claim that her disability and nursing home needs could not have been

anticipated. It cannot be found that the raising of these claims would have been futile.

Nor can it be found that the expense of raising the defense would have outweighed the benefit to be received. The petitioner argues that under a Health Care Financing Administration (HCFA) Transmittal (#64, Sec. 3257(B)(3)) she is not required to take action to obtain an asset if the cost of doing so is "greater than the assets are worth, thus effectively rendering the assets worthless to the individual." The petitioner has put on no evidence of the likely cost of defending this motion. If she had it would presumably have been much less than the $406,000 she lost by agreeing to the modification. Furthermore, the Department's attorney has pointed out in her memorandum that had the petitioner's attorneys contacted the Medicaid division about the ex-husband's motion, the Department would have intervened as an interested party and opposed it at taxpayers' expense.

This matter is very much like other situations in which the New York appeals courts have found that the failure to pursue a legal right to income or resources is a disqualifying transfer under its state Medicaid regulations. In the case of In re Estate of Scrivani, 116 Misc.2d 204, 455 N.Y.S.2d 505 (1982), the conservator for the Medicaid applicant had refused

an inheritance in order to preserve the assets for her children and to avoid paying her creditor nursing home. The court pointed out that it is not illegal to refuse an inheritance but that the refused money could be considered an available resource to the applicant in a program operated with limited public resources. Similarly the court pointed out in Molloy v. Bane, 214 A.2d. 171, 631 N.Y.S.2d 910 (1995) that it was legal to refuse an inheritance (from a wrongful death suit), even to frustrate creditors, but such a refusal has consequences under Medicaid law. The court concluded that an applicant for Medicaid has an obligation to pursue a potential resource because "underlying all eligibility determinations is a basic premise that aid is to be furnished only to the truly needy… " Id., at 913. Even closer to the case in point, the New York Supreme Court Appellate Division found in Flynn v. Bates, 67 A.D.2d 975, 413 N.Y.S. 2d 446 (1979), that a Medicaid applicant's refusal to elect her spousal share from her husband's estate (which had been left entirely to the children) was a transfer of resources. The Court said that under the Medicaid program, "the petitioner may not knowingly and intelligently waive her legal right to a sizeable sum of money and then present herself as 'a needy person.'" Id. at 448.

Although these cases rely on New York Medicaid law, the same provisions against transfer of assets and the same policy of assisting only those in financial need exist in Vermont Medicaid law.[3] Some of the decisions from this and other states have been incorporated into an interpretive bulletin published by HCFA in November of 1994. Medicaid Manual Transmittal 64, Sec. 3257. That transmittal includes much of the language found under "Note" in M416 above and includes an interpretation that the term "'assets an individual or spouse is entitled to'" includes assets to which the individual is entitled or would be entitled if action had not been taken to avoid receiving the assets." Id. at (B)(3). That same section goes on to give "examples of actions which would cause income or resources not to be received" as follows:

- Irrevocably waiving pension income;
- Waiving the right to receive an inheritance;
- Not accepting or accessing injury settlements;
- Tort settlements which are diverted by the defendant into a trust or similar device to be held for the benefit of an individual who is a plaintiff; and

[3] This is because all state regulations must comply with federal Medicaid provisions in order to obtain federal matching funds. See 42 U.S.C. Sec. 1396 et seq. The federal regulations restrict payment to those whose "income is insufficient to meet the costs of medical services" and place restrictions on transfer of assets. See 42 U.S.C. §§ 1396 and 1917©.

- Refusal to take legal action to obtain a court ordered payment that is not being paid, such as child support or alimony.

The petitioner's final argument is that she cannot be found to have transferred her resources because her situation does not fit any of the examples. With regard to the last example above, she argues that her case must be distinguished because her failure to take legal action did not involve attempting to obtain alimony. Rather, she argues, she was already receiving it and the legal action took her alimony away. This claim is a distinction without a difference. The HCFA interpretation clearly expects that an applicant will take legal action to obtain alimony payments, and that would logically include taking legal action to prevent alimony payments from being taken away. The petitioner's claim is totally without merit in this regard.

It must be concluded in this matter that the petitioner did effectuate a transfer of non-excludable income and resources which were available to her at a time that she was already in long-term care for the purpose of becoming Medicaid eligible so that she could save her ex-husband the expense of her support and medical care and preserve assets for her children to inherit. Within two months of causing her own impoverishment (which she accomplished with the advice of

counsel), she applied for Medicaid benefits to pay the cost of her long-term care. Under M416, the petitioner was thus subject to a penalty disqualifying her from long-term care benefits for a period of time. That period of time was calculated as required by the regulation at M416.23 by accumulating the total value of the transferred assets and dividing it by the monthly average cost of a private nursing home in Vermont. The Department's decision to disqualify her for 97 months is in accordance with both federal and state law and the Department's own regulations and must be affirmed by the Board. 3 V.S.A. § 3091(d).

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